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SUPREME COURT OF THE UNITED STATES

No. 985

MARRS McLEAN, *Petitioner*

vs.

THE STATE OF TEXAS, *Respondent*

BRIEF OF RESPONDENT THE STATE OF TEXAS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

	Page
Additional Statement	1
Reply to Grounds of Jurisdiction	2, 3, 4, 5
Summary of Argument	6
Point One	6
Point Two	7
Point Three	8

INDEX OF AUTHORITIES

Amer. Liberty Oil Co. v. State, 125 S. W. (2) 1107	9
Amer. Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231	6
Barnsdall v. Bradford Gas Co., 225 Pa. 338, 74 A. 207, 26 L. R. A. (N. S.) 614	9
Bracken v. Van Zandt Co., 74 S. W. (2) 540	9
Caldwell v. Texas, 137 U. S. 692, 34 L. Ed. 816	2
Cobb v. Downing, 1 S. W. (2) 508, Appeal Dis. 278 U. S. 560, 73 L. Ed. 506, Cert. Den. 278 U. S. 646, 73 L. Ed. 559	8
Edward Hinds Yellow Pine Trustees v. Martin, 268 U. S. 458, 69 L. Ed. 1050	7
Enterprise Irr. Dist. v. Farmers Mut. Canal Co., 243 U. S. 157, 61 L. Ed. 644	3
Equitable Life Assur. v. Brown, 187 U. S. 308, 47 L. Ed. 190	2
Federal Royalty Co. v. State, 124 Tex. 290, 77 S. W. (2) 1021	9
Ferguson v. Steen, 293 S. W. 318	8
Gasquet v. Lapeyere, 242 U. S. 367, 61 L. Ed. 367	2
Great N. R. Co. v. Sunburst O. & R. Co., 287 U. S. 358, 77 L. Ed. 360	4
Gunn v. Barry, 15 Wall 610, 21 L. Ed. 212	2
Hager v. Stakes, 116 Tex. 453, 294 S. W. 835	8
Hartford L. Ins. Co. v. Johnson, 249 U. S. 490, 63 L. Ed. 722	6
Hawks v. Hamill, 288 U. S. 52, 77 L. Ed. 610	7

	Page
Hendrickson v. Apperson, 245 U. S. 105, 62 L. Ed. 178	2
Herndon v. Georgia, 295 U. S. 441, 79 L. Ed. 1530, Anno 79 L. Ed. 1539-1541	6
McLean v. Commissioner, 120 Fed. (2) 942	10
Missouri P. R. Co. v. Hanna, 266 U. S. 184, 69 L. Ed. 235	7
Prince Bros. Drlg. Co. v. Fuhrman, 150 S. W. (2) 314	9
Quintana Petroleum Co. v. State, 134 Tex. 179, 133 S. W. (2) 112	10
Rhoads Drilling Co. v. State, 105 S. W. (2) 298	9
Seattle R. & S. R. Co. v. Washington, 231 U. S. 568, 58 L. Ed. 372	3
Sheffield v. Hogg, 124 Tex. 290, 77 S. W. (2) 1021	4, 9, 10
Sheppard v. Stanolind O. & G. Co., 125 S. W. (2) 643	9
Stair v. Smith, 209 S. W. 660	8
State v. Downman, 134 S. W. 787, 231 U. S. 353, 58 L. Ed. 264	8
State v. Quintana Pet. Co., 134 Tex. 179, 133 S. W. (2) 112, 128 A. L. R. 843	9
Stephens County v. Mid-Kansas Oil and Gas Co., 113 Tex. 160, 254 S. W. 290	3, 8
Tennant v. Dunn, 130 Tex. 285, 110 S. W. (2) 53	9
Texas Co. v. Daugherty, 107 Tex. 226, 176 S. W. 717	8
Theo Oil Co. v. Thomas, 108 S. W. (2) 555	9
Thomason v. Veal, 144 S. W. (2) 361	9
Tidal Oil Co. v. Flanagan, 263 U. S. 444, 68 L. Ed. 382	5
U. S. v. Noble, 237 U. S. 74, 59 L. Ed. 846	9
Van Hoffman v. Quincy, 4 Wall 535, 18 L. Ed. 403	2
Victory v. Hinson, 129 Tex. 30, 102 S. W. (2) 194	9
Wabash R. Co. v. Flanagan, 192 U. S. 29, 48 L. Ed. 328	2
Waggoner Estate v. Wichita County, 273 U. S. 113, 71 L. Ed. 566	3, 7
Wick v. Chelan Elec. Co., 280 U. S. 108, 74 L. Ed. 212	2
Wilcox v. Hull Daisetta I. S. D., 95 S. W. (2) 490	9
Willoughby v. Chicago, 235 U. S. 45, 59 L. Ed. 123	6

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ADDITIONAL STATEMENT

(Petitioner's Brief Pp. 1-5)

The nature and characteristics of the interest in land, taxes upon which constitute the subject matter of Respondent's suit, are the very crux of this litigation. These taxes were dues on an interest in the *production* from the oil and gas leases described (R-2), equivalent to 12-1/2% of the oil and gas produced therefrom, described as "Real Estate * * * an interest in an oil and gas leasehold estate, or what is commonly known and referred to as a one-eighth (1/8) or .125 oil payment or overriding oil-payment contract interest * * * " (R-2), characterized by Trial Court as " * * * the right to receive one-eighth of the proceeds of oil and gas produced from lands described in Plaintiff's petition * * * " (R-15).

The taxes sued for are admittedly unpaid. (R-15) Apart from the contention that Petitioner owned no interest in the land, no attack was made on the validity of the taxes sued for; the sole and only question being whether the interest owned by Respondent is an interest in land, for the purpose of taxation. (R-16)

REPLY TO GROUNDS OF JURISDICTION

Jurisdiction is lacking here because the judgments of the courts below are based wholly on a non Federal ground; that is, that under applicable local statutes, the interest or right owned by Petitioner is taxable as real property.

Caldwell v. Texas, 137 U. S. 692, 34 L. Ed. 816;
Van Hoffman v. Quincy, 4 Wall 535, 18 L. Ed. 403;
Gunn v. Barry, 15 Wall 610, 21 L. Ed. 212;
Hendrickson v. Apperson, 245 U. S. 105, 62 L. Ed. 178;
Equitable Life Assur. v. Brown, 187 U. S. 308, 47 L. Ed. 190;
Wabash R. Co. v. Flanagan, 192 U. S. 29, 48 L. Ed. 328;
Wick v. Chelan Elec. Co., 280 U. S. 108, 74 L. Ed. 212.

A final decision of the State court of last resort, based wholly on State law, is binding upon this Court and such decision is not reviewable here.

Gasquet v. Lapeyere, 242 U. S. 367, 61 L. Ed. 367;

Enterprise Irr. Dist. v. Farmers Mut. Canal Co., 243 U. S. 157, 61 L. Ed. 644;
Seattle R. & S. R. Co. v. Washington, 231 U. S. 568, 58 L. Ed. 372.

Jurisdiction in the case at bar cannot possibly be predicated upon the pronouncements of this Court in *Waggoner Estate v. Wichita County*, 273 U. S. 113, 71 L. Ed. 566. That was an appeal from a United States Court; this Court expressly held that it was unnecessary to deal with the constitutional questions presented; that the interest involved, similar in all respects, except its duration, to that involved here, was properly taxed as realty, and that whether such interest was realty or personalty was a question of State law. The element of discrimination alleged in that case has not even been suggested in this controversy. That discrimination was the constitutional question referred to in the opinion is made perfectly clear by the review of the prior history of the case appearing on page 115 of the official reports, as follows: "They held also that the assessment was not discriminatory and did not violate the provisions of the 14th Amendment."

Complete misapprehension of the basis of the decision in Waggoner's case appears to have been responsible for its adoption as a ground of jurisdiction in this proceeding.

The Supreme Court of the State of Texas has made no change whatever in its rulings regarding the nature and taxability of interests in oil and gas from the very beginning of our jurisprudence. Indeed the sole and only authoritative determination in *Stephens County*

v. Mid-Kansas Oil and Gas Co., 113 Tex. 160, 254 S. W. 290, relied on by Petitioner, was that an oil and gas lease, commonly known in the oil industry as a 7/8ths Working Interest, (the interest involved in this suit being a fractional portion of such leasehold estate, subject to limitation) is an interest in land and subject to taxation as real estate under Texas law.

Quotation of an isolated statement from that opinion, bearing upon a question not before the Court, may serve to reveal a veiled inconsistency of the langauge employed in dealing with the conventional 1/8 royalty interest of a land owner, with the language employed in the opinion in *Sheffield v. Hogg*, 124 Tex. 290, 77 S. W. (2) 1021, but certainly no conflict can be said to exist. The Court in the Stehpens case dealt with the lessee's interest while in the Sheffield case the lessor's interest was the subject of the controversy.

In no case has any Texas Court of last resort held, at any time, before or after the execution of the assignment under inquiry here, that any character of interest in the production or any right to be paid out of production of oil and gas, is anything other than real estate, under our law, as is conclusively demonstrated by even a cursory examination of the authorities.

Granting, however, argumentatively, that such a change occurred, how may a denial of any Federal constitutional right be reasoned? Aptly stated by Justice Cardozo in *Great N. R. Co. v. Sunburst O. & R. Co.*, 287 U. S. 358, 77 L. Ed. 360, at P. 366, the rule is that even if such a change occurred, and the change operated retroactively, no Federal constitutional guar-

anty would be invaded. Speaking for the Court, the Justice outlined the rule as follows: "This is not a case where a Court in overruling an earlier decision has given to the new ruling a retroactive bearing, and thereby has made invalid what was valid in the doing. *Even that may often be done*, though litigants not infrequently have argued to the contrary." *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 68 L. Ed. 382, and other cases of like nature are cited. (Emphasis ours.)

Petitioner, for the first time in the course of this litigation, made a tardy effort in his motion for rehearing in the Texas Court of Civil Appeals, endeavoring to inject into the case the semblance of a Federal question. His chief complaint is that he should have been permitted to pay taxes upon his property in Bexar County, the county of his residence, rather than in in Galveston County where the real estate is situated. Nowhere does he contend that he is not lawfully obligated to pay taxes to Respondent in one or the other of such counties. It is impossible to perceive any tenable ground of Federal jurisdiction of such a complaint.

SUMMARY OF ARGUMENT

1. That the Petition does not comply with Rule 38 of the Rules of this Court, presents no Federal question, and does not sustain jurisdiction in this Court.

2. That this Court is bound by the decisions of the courts of last resort of the State of Texas in passing upon the character of property owned by the Petitioner.

3. That Petitioner is the owner of an interest in land for the purpose of taxation, classified as real estate, under applicable statutes and the decisions construing them, of the State of Texas.

POINT ONE

That the Petition does not comply with Rule 38 of the Rules of this Court, presents no Federal question, and does not sustain jurisdiction in this Court.

The alleged Federal question was presented for the first time upon motion for rehearing in the State Court of Civil Appeals and came too late to sustain jurisdiction in this Court.

Hartford L. Ins. Co. v. Johnson, 249 U. S. 490, 63 L. Ed. 722;

Willoughby v. Chicago, 235 U. S. 45, 59 L. Ed. 123;

Amer. Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231;

Herndon v. Georgia, 295 U. S. 441, 79 L. Ed. 1530, Anno. 79 L. Ed. 1539-1541.

No Federal question was passed upon by the State Courts, which grounded their decisions wholly upon state property tax laws. In these circumstances no jurisdiction of the Petition in this Court can be sustained.

Missouri P. R. Co. v. Hanna, 266 U. S. 184, 69 L. Ed. 235.

Repeated statements, wholly unsupported by facts, that Petitioner has been denied equal protection cannot supply otherwise undiscoverable jurisdiction in this case. Moreover such statements cannot serve to confer jurisdiction in the complete absence of any claimed discrimination, or any tenable constitutional question, properly raised and passed upon, within the jurisdiction of this Court.

POINT TWO

That this Court is bound by the decisions of the courts of last resort of the State of Texas in passing upon the character of property owned by the Petitioner.

It is a fimiliar and universally recognized rule that the United States Courts are bound by the determinations of State Courts as to the meaning of State Statutes, and as to rules of property law of the several States.

Waggoner Estate v. Wichita Co., 273 U. S. 113, 71 L. Ed. 566;

Edward Hinds Yellow Pine Trustees v. Martin, 268 U. S. 458, 69 L. Ed. 1050;

Hawks v. Hamill, 288 U. S. 52, 77 L. Ed. 610.

The single question involved in this case is one of State property tax law. The courts of last resort of the State have finally passed upon this question both in this and prior cases involving the same and related issues. Nothing can be clearer than that this disposition, wholly uncomplicated by the injection of any bona fide constitutional question, is final and binding in this tribunal.

POINT THREE

That Petitioner is the owner of an interest in land for the purpose of taxation, classified as real estate, under applicable statutes and the decisions construing them, of the State of Texas.

From the very beginning of litigation which has laid the foundations of Texas property tax laws, fractional interests in oil and gas in place; indeed, any character of right to share in or be paid out of the proceeds of the sale of oil and gas produced from land has been held to be realty for the purpose of taxation.

Hager v. Stakes, 116 Tex. 453, 294 S. W. 835;
State v. Downman, 134 S. W. 787, 231 U. S. 353, 58 L. Ed. 264;
Texas Co. v. Daugherty, 107 Tex. 226, 176 S. W. 717;
Stephens County v. Mid Kansas O. & G. Co., 113 Tex. 160, 254 S. W. 290;
Ferguson v. Steen, 293 S. W. 318;
Stair v. Smith, 209 S. W. 660;
Cobb v. Downing, 1 S. W. (2) 508, Appeal Dis. 278 U. S. 560, 73 L. Ed. 506, Cert. Den. 278 U. S. 646, 73 L. Ed. 559;

Federal Royalty Co. v. State, 124 Tex. 290, 77 S. W. (2) 1021;
Victory v. Hinson, 129 Tex. 30, 102 S. W. (2) 194;
Bracken v. Van Zandt Co., 74 S. W. (2) 540;
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Tennant v. Dunn, 130 Tex. 285, 110 S. W. (2) 53;
Thomason v. Veal, 144 S. W. (2) 361;
Prince Bros. Drlg. Co. v. Fuhrman, 150 S. W. (2) 314;
Sheppard v. Stanolind O. & G. Co., 125 S. W. (2) 643.

The general rule that rents, royalties, or profits to accrue in the future, out of land, are interests in real estate, is supported by unbroken lines of decisions, both in the Courts of the State of Texas and in this Court.

U. S. v. Noble, 237 U. S. 74, 59 L. Ed. 846;
Barnsdall v. Bradford Gas Co., 225 Pa. 338, 74 A. 207, 26 L. R. A. (N. S.) 614.

The very interest here involved was determined by the United States Circuit Court of Appeals for this circuit, to be real estate.

McLean v. Commissioner, 120 Fed. (2) 942.

The recent decision of the Supreme Court of Texas, involving an interest identical in all respects to the interest owned by Petitioner, except for the absence here of the exact language of reservation there employed, is presented in *Quintana Petroleum Co. v. State*, 134 Tex. 179, 133 S. W. (2) 112, in which our court of last resort patently endeavored to state rules of general application and settle, once and for all, every question as to the proper procedure for taxation of any right, however created, to payment of money out of oil and gas production. The opinion is so clearly determinative of the controversy here presented as to leave no room for sensible argument.

The Texas rule as to interests of the nature of that owned by Petitioner is to be found in the opinion in *Sheffield v. Hogg*, 124 Tex. 290, 77 S. W. (2) 1021, as follows:

> "Reading the constitution and statutes together, there is no escape from the conclusion that the interests here involved are meant to be taxed as real estate. Classify them as you may, they are at least rights or privileges belonging or in some wise appertaining to real property, and the Legislature has provided that they be taxed as such."

Respondent prays that the petition for certiorari be denied.

Respectfully submitted,

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